Mentari Housing Development Sdn Bhd & Anor v Abdul Ghapor Hussin & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02–435 OF 2004, B-02–1307 OF 2005 AND 1308 OF 2005
LOW HOP BING, SYED AHMAD HELMYAND APANDI ALI JJCA
14 DECEMBER 2011

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Local Government — Town planning — Application for planning permission — Planning permission for proposed development — Validity of — Whether planning permission granted by MPPJ valid — Whether MPPJ complied with mandatory provisions — Whether proposed development did not require any planning permission — Whether state secretary's letter to MPPJ gave any exemption under s 19(2)(g) of the Town and Country Planning Act 1976 — Whether purported exemption null and void — Town and Country Planning Act 1976 ss 19(2)(g), 21(6), (7) & 22(1)

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The state authority had alienated an area in Taman Desaria, Petaling Jaya to Mentari Housing Development Sdn Bhd ('Mentari') for a proposed development. Being dissatisfied with the proposed development, the residents of Taman Desaria and neighbouring lands ('the applicants') had questioned the Majlis Perbandaran Petaling Jaya ('MPPJ') as to whether it had granted any planning permission to Mentari. The applicants also wrote to the Minister of Housing and Local Government about their objections to the proposed development. The MPPJ did not reply to the applicants' letters but later issued a notice, which notified the applicants that they had 21 days to object to the application for planning permission granted to Mentari for the proposed development. The applicants lodged their written objections and sought a hearing pursuant to s 21 of the Town and Country Planning Act 1976 ('the Act'). Despite the statutory hearing initiated and planning permission not having been granted, works on the proposed development continued. The applicants wrote to MPPJ asking it to issue a stop work order pending the application for planning permission. At the statutory hearing, Mentari claimed that it had already obtained the requisite planning permission from MPPJ prior to commencement of works on the proposed development. The applicants then filed an action for, inter alia, a declaration that the proposed development was null and void as it contravened ss 21(6) and (7) and 22(1) of the Act with damages to be assessed. The applicants submitted that all development works undertaken by Mentari in respect of the development from the date of commencement of works to the date of the filing of the suit against Mentari and MPPJ were null and void for contravening the provisions of the Act. The applicants argued that no statutory hearing was held by MPPJ prior to the granting of the alleged planning permission. The High Court judge found

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in favour of the applicants and granted the declarations prayed for with costs. These were the appeals by Mentari and MPPJ ('the appellants') against the decision of the High Court.

Held, dismissing the appeals with costs of RM25,000:

(1) It was the court's view that ss 21(6) and (7) of the Act conferred on the applicants a statutory right to be heard, while ss 22(1) and (2) of the Act required MPPJ to consider the applicants' objections before planning permission could be granted to Mentari for the proposed development. It was abundantly clear that MPPJ had not complied with these mandatory provisions i.e. before the purported planning permission was granted to Mentari. MPPJ's issuance of the notice to the applicants and the holding of the statutory hearing were in flagrant violation of ss 21(6), (7) and 22(1) of the Act, being afterthoughts by way of rescue operations in order to remedy a manifest error of granting planning permission without complying with the mandatory provisions of the Act. Thus it was held that the purported planning permission was null and void and that the High Court judge had not erred in his decision (see paras 24 & 28).

(2) Mentari and MPPJ's alternative argument that the proposed development did not require any planning permission because of the exemption under s 19(2)(g) of the Act did not find favour with this court. Under s 19(2)(g) of the Act no planning permission was necessary if the state Authority prescrib ed that no planning permission was necessary to carry out the development. However, in the present case, MPPJ had made no reference to the alleged exemption when questioned by the Minister about the application for planning permission in respect of the proposed development. Further, had there been such an exemption, there would have been no necessity for MPPJ to subsequently initiate the process for the statutory hearing under s 21(6) of the Act. In addition, Mentari being the developer of the proposed development would have known of the existence of such an exemption but there was no indication that it was aware of the existence of such an exemption (see paras 33–39).

(3) The letter from the Selangor Deputy state secretary to the district officer of the MPPJ, an important contemporaneous document, made no mention of the fact that the proposed development did not require any planning permission because of the exemption under s 19(2)(g) of the Act. In any event, only the state authority was vested with the power to grant the exemption under s 19(2)(g) of the Act and that was not the case in the present instance (see paras 40–42).

[Bahasa Malaysia summary

Pihak berkuasa negeri telah memberi milik kawasan dalam Taman Desaria, Petaling Jaya kepada Mentari Housing Development Sdn Bhd ('Mentari')

untuk suatu cadangan pembangunan. Tidak berpuas hati dengan cadangan pembangunan tersebut, penghuni Taman Desaria dan tanah-tanah perjiranan ('pemohon-pemohon') telah menyoal Majlis Perbandaran Petaling Jaya ('MPPJ') tentang sama ada ia telah memberi sebarang kebenaran perancangan kepada Mentari. Pemohon-pemohon juga telah menulis kepada Kementerian Perumahan dan Kerajaan Tempatan tentang bantahan-bantahan terhadap cadangan perumahan tersebut. MPPJ tidak membalas surat pemohon-pemohon tetapi kemudian mengeluarkan notis yang mana memberitahu pemohon-pemohon bahawa mereka mempunyai 21 hari untuk membuat bantahan terhadap permohonan untuk kebenaran perancangan tersebut. Pemohon-pemohon telah membuat bantahan bertulis mereka dan memohon perbicaraan menurut s 21 Akta Perancangan Bandar dan Desa 1976 ('Akta'). Meskipun perbicaraan statutori telah dimulakan dan kebenaran perancangan masih belum diberikan, kerja-kerja cadangan pembangunan telah diteruskan. Pemohon-pemohon telah menulis kepada MPPJ memohon ia untuk mengeluarkan perintah berhenti kerja sementara menunggu permohonan untuk kebenaran perancangan. Semasa perbicaraan statutori tersebut, Mentari telah berhujah bahawa ia telah menerima kebenaran perancangan yang diperlukan daripada MPPJ sebelum memulakan kerja-kerja cadangan pembangunan. Pemohon-pemohon kemudian telah memfailkan suatu tindakan untuk, antara lain, deklarasi bahawa cadangan pembangunan adalah tidak sah dan terbatal memandangkan ia bercanggah dengan ss 21(6) dan (7) dan 22(1) Akta bersama ganti rugi untuk ditaksir. Pemohon-pemohon telah berhujah bahawa kesemua kerja pembangunan yang dilakukan oleh Mentari berkaitan dengan pembangunan daripada tarikh permulaan kerja-kerja sehingga tarikh memfailkan guaman terhadap Mentari dan MPPJ adalah tidak sah dan terbatal sebelum kebenaran perancangan yang dikatakan telah diberikan. Hakim Mahkamah Tinggi membuat dapatan berpihak kepada pemohon-pemohon dan membenarkan deklarasi-deklarasi yang dipohon dengan kos. Ini merupakan rayuan-rayuan oleh Mentari dan MPPJ ('perayu-perayu') terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM25,000:

(1) Adalah pandangan mahkamah bahawa ss 21(6) dan (7) Akta memberi pemohon-pemohon hak statutori untuk didengar, sementara ss 22(1) dan (2) Akta memerlukan MPPJ untuk mempertimbangkan bantahan pemohon-pemohon sebelum kebenaran perancangan boleh diberikan kepada Mentari untuk cadangan pembangunan tersebut. Adalah sangat jelas bahawa MPPJ tidak mematuhi peruntukan-peruntukan mandatori ini iaitu sebelum kebenaran perancangan yang dikatakan telah diberikan kepada Mentari. Pengeluaran notis oleh MPPJ kepada pemohon-pemohon dan perbicaraan statutori yang telah dijalankan merupakan percanggahan terang-terangan terhadap ss 21(6), (7) dan 22(1) Akta, sesuatu yang difikirkan semula melalui operasi

menyelamatkan untuk remedi kesilapan yang nyata dengan memberikan kebenaran perancangan tanpa mematuhi peruntukan-peruntukan mandatori Akta. Justeru adalah diputuskan bahawa kebenaran perancangan tersebut adalah tidak sah dan terbatal dan bahawa hakim Mahkamah Tinggi tidak khilaf dalam keputusannya (lihat perenggan 24 & 28).

(2) Hujahan alternatif Mentari dan MPPJ bahawa pembangunan yang dicadangkan tidak memerlukan apa-apa kebenaran perancangan oleh kerana pengecualian di bawah s 19(2)(g) Akta tidak diterima oleh mahkamah ini. Di bawah s 19(2)(g) Akta kebenaran perancangan tidak diperlukan sekiranya pihak berkuasa negeri mengatakan kebenaran perancangan adalah tidak perlu untuk meneruskan pembangunan tersebut. Walau bagaimanapun, dalam kes ini, MPPJ tidak membuat sebarang rujukan terhadap pengecualian yang dikatakan berkaitan dengan pembangunan yang dicadangkan tersebut. Selanjutnya, sekiranya terdapat pengecualian sedemikian, adalah tidak perlu bagi MPPJ untuk kemudiannya memulakan proses perbicaraan statutori di bawah s 21(6) Akta. Tambahan, Mentari sebagai pemaju bagi cadangan pembangunan seharusnya mengetahui kewujudan pengecualian tersebut akan tetapi tidak terdapat sebarang petunjuk bahawa ia sedar tentang kewujudan pengecualian tersebut (lihat perenggan 33–39).

(3) Surat daripada Timbalan Setiausaha Negeri Selangor kepada pegawai daerah MPPJ, dokumen semasa yang penting, tidak menyebut fakta bahawa pembangunan yang dicadangkan tidak memerlukan sebarang kebenaran disebabkan pengecualian di bawah s 19(2)(g) Akta dan ia bukanlah kes sedemikian dalam kes ini (lihat perenggan 40–42).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

Legislation referred to

Interpretation Acts 1948 and 1967
Town and Country Planning Act 1976 ss 19(1), (2)(g), 21, 21(1), (2), (3), (4), (5), (6),(7), (8), 21A, 22, 22(1), (2)

Appeal from: Judicial Review No MT4–13–24 of 2003 (High Court, Shah Alam)

Felix Dorairaj (Dorairaj, Low & Teh) and V Sivaparanjothi (V Siva and Partners) for the appellants.
Sivarasa Rasiah (Daim & Gamany), (Fernandez & Selvarajah) and Ravi Nekoo (Nekoo Parames & Tung) for the respondents.

Low Hop Bing JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us are the following appeals:

(a) Appeal No B-02–1307 of 2005 filed by Mentari Housing Development Sdn Bhd ('Mentari'); and

(b) Appeal No B-02–1308 of 2005 filed by the (then) Majlis Perbandaran Petaling Jaya (MPPJ).

Appeal No B-02–435 of 2004 has been withdrawn by the appellant MPPJ and therefore struck out.

[2] Both these appeals are lodged against the following orders of the Shah Alam High Court:

(a) a declaration that the planning permission purportedly issued by MPPJ on 15 March 2003 to Mentari in respect of the proposed development known as 'Cadangan Pembinaan 2 Blok Rumah Pangsa Kos Rendah 12 Tingkat 9594/631 unit Beserta Tapak Fardu Ain dan Gerai di atas Bekas Simpanan Talian Elektrik, Jalan PJS 5/6 dan Jalan PJS 5/12A, Taman Desaria, Petaling Jaya, Selangor Darul Ehsan' ('the proposed development') is null and void as it contravened the Town and Country Planning Act 1976 ('the Act');

(b) a declaration that all development works undertaken by Mentari in respect of the development from the date of commencement of works to the date of filing the suit is null and void as it contravened the provisions of the Act;

(c) MPPJ to pay the applicants damages to be assessed; and

(d) costs to be paid by MPPJ and Mentari to the applicants.

[3] The High Court also allowed buyers of the low cost apartments (being built by Mentari); and the Selangor state authority to intervene as interveners.

FACTUAL BACKGROUND

[4] The applicants in the High Court are residents of Taman Desaria, Jalan Klang Lama, Petaling Jaya and owners of the neighbouring lands in relation to the proposed development which the applicants alleged was illegal and in contravention of the Act, being:

(a) without any valid planning permission from MPPJ; and

(b) inconsistent with the structure plan, thereby turning the area into an urban slump, and transforming the population ratio to ten times what it is supposed to be.

[5] The state authority had alienated an area measuring 6.11 acres in Taman Desaria to Mentari.

[6] The applicants alleged that the first time they were told about the proposed development was when they received a letter dated 17 April 2003 from MPPJ inviting them to a 'Majlis Penerangan' (information session) on 24 April 2003.

[7] Being dissatisfied with the proposed development, the applicants vide solicitors' letter dated 12 May 2003 addressed to MPPJ specifically asked MPPJ whether it had granted any planning permission to Mentari. MPPJ did not reply.

[8] On 20 May 2003, the applicants wrote to the Minister of Housing and Local Government ('the Minister'), stating their objections to the proposed development.

[9] In early June 2003, construction works for the proposed development began.

[10] On 20 June 2003, the applicants' solicitors wrote a second letter to MPPJ, and also to the Selangor Director of Town and Country Planning.

[11] Up to 8 July 2003, MPPJ has not replied to any of the applicants' aforesaid two letters.

[12] On 8 July 2003, under r 7 of the Fourth Schedule to the Planning Control (General) (Selangor) Rules 2001 (Sel PU 9 dated 21 January 2001), MPPJ issued Form A notices to some of the applicants, notifying them that an application for planning permission has been received and that they have 21 days to object.

[13] The applicants then wrote to MPPJ asking for various documents stipulated in s 21(1) and s 21A of the Act (a reference hereinafter to a section is a reference to that section in the Act). An officer of MPPJ verbally told Dr Ghapor Hussin, a representative of the applicants, that those documents were not available. Although MPPJ did not supply the statutory documents, the applicants lodged their written objections dated 28 July 2003, and sought a hearing pursuant to the Act.

[14] On 11 August 2003, the Director of Town and Country Planning replied to the applicants' letter of 20 June 2003, stating that planning permission for the proposed development is under the jurisdiction of MPPJ.

[15] Despite the statutory hearing being initiated under s 21 and planning permission not having been granted, works on the proposed development continued.

[16] On 31 July 2003, the applicants sent a letter to MPPJ asking MPPJ to issue a stop-work order pending the application for planning permission.

[17] On 12 August 2003, the Minister wrote to MPPJ, with a copy to the applicants, recommending that a stop-work order be issued pending the disposal of the application for planning permission.

[18] On 26 August 2003, MPPJ replied to the Minister, (but no copy was sent to the applicants) saying, inter alia, that:

(a) the Exco of Majlis Tindakan Ekonomi Selangor (Selangor Economic Action Council — 'SEAC') had approved in principle the alienation of the land to Mentari;

(b) planning permission was approved by MPPJ on 15 March 2003;

(c) an information session was held for the residents on 24 March 2003; and

(d) a hearing of objections would take place on 23 August 2003.

[19] On 23 August 2003, the statutory hearing of objections took place.

VALIDITY OF PLANNING PERMISSION DATED 15 MARCH 2003

[20] The argument advanced for Mentari is that, prior to commencement of works on 2 June 2003, Mentari had already obtained the requisite planning permission from MPPJ on 15 March 2003, and that the proposed development cannot be said to be in contravention of the Act.

[21] The contention presented for MPPJ is to the same effect.

[22] The applicants supported the learned High Court judge's view that MPPJ was in flagrant violation of s 21(6), (7) and s 22(1), as no statutory hearing was ever held by MPPJ prior to the so-called planning permission.

[23] The question which we must decide is:

Is the planning permission, purportedly given by MPPJ on 15 March 2003 to Mentari in respect of the proposed development, valid under the Act?.

[24] In our view, an application for planning permission must be made pursuant to the detailed procedure prescribed in s 21(1)–(8), more specifically s 21(6) which merits reproduction as follows:

> 21 Application for planning permission
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> (6) If the proposed development is located in an area in respect of which no local plan exists for the time being, then, upon receipt of an application for planning permission, or, where directions have been given under subsection (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them, inform the owners of the neighbouring lands of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

[25] It is immensely important to note that Taman Desaria in which the proposed development was to be carried out had no local plan, as confirmed by MPPJ's Director of Developmental Planning Department in her affidavit to the effect that 'the local plan for Taman Desaria is yet to be completed'. The applicants lodged their written objections with MPPJ on 28 July 2003, and attended the statutory hearing on 23 August 2003 and there raised their written objections to the proposed development under s 21(7). Nevertheless, MPPJ took no further action thereafter, when it is incumbent on MPPJ to comply with the mandatory requirements under s 22(1) and (2).

[26] Section 22(1) reads:

> (1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which section 21(6) applies, as soon as possible after the expiry of the period within which objections may be made or, if objections have been made, as soon as possible after the objections have been dealt with under s 21(7), the local planning authority shall decide on the application for planning permission.

[27] Section 22(2) sets out the particulars which MPPJ must consider. It reads:

> (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular —
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> (a) the provisions of the development plan, if any;
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> (aa) the direction given by the Committee, if any;

(b) the provisions that it thinks are likely to be made in any development under preparation or to be prepared, or the proposals relating to those provisions;

(ba) the provisions of the Sewerage Services Act 1993;

(bb) the development proposal report; and

(c) the objections, if any, made under s.21.

[28] In our view, s 21(6)–(7) confer on the applicants a statutory right to be heard, while s 22(1)–(2) require MPPJ to consider the applicants' objections before planning permission can be granted to Mentari. It is abundantly clear to us that MPPJ has not compiled with these mandatory provisions ie before the purported planning permission was granted on 15 March 2003. MPPJ's issuance of the statutory notices on 8 July 2003 and holding of the statutory hearing on 23 August 2003 were in flagrant violation of s 21(6), (7); s 22(1) and (2), being afterthoughts by way of rescue operations in order to remedy a manifest error caused by putting the cart before the horse, so to speak. The effect of such non-compliance with the aforesaid mandatory provisions of the Act is to render the purported planning permission null and void. We therefore answer the above question in the negative.

EXEMPTION FROM PLANNING PERMISSION

[29] Alternatively, Mentari, MPPJ and the Selangor state authority contended that the proposed development did not require any planning permission as it had been exempted by the state authority under s 19(2)(g). They relied on the Selangor State Secretary's letter dated 17 February 2003 addressed to MPPJ's President ('the state secretary's letter').

[30] The applicants took the position that the state secretary's letter did not give any exemption under s 19(2)(g) and that in any event the purported exemption is null and void.

[31] The learned High Court judge held that there was no such exemption, or, even if there was, it was null and void.

[32] Under this head, the question which we have to address is:

> Having regard to the facts and contemporaneous documents, more specifically the state secretary's Letter, was there any exemption or valid exemption granted pursuant to s 19(2)(g)?.

[33] To start with, s 19(1) generally prohibits the commencement,

undertaking or carrying out of any development unless planning permission is granted under s 22. Section 19(1), where relevant, reads:

> 19 Prohibition of development without planning permission
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> (1) No person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted to him under s 22 …

[34] Exceptions are created under s 19(2). One such exception is set out in s 19(2)(g) as follows:

> (2) Notwithstanding subsection (1), no planning permission shall be necessary —
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> (g) for the making of such material change in the use of land or building as the state Authority may prescribe to be a material change for which no planning permission is necessary.

[35] The intention of Parliament as reflected in s 19(1) is to prohibit any person, other than a local authority, to eg commence any development without planning permission. Of course, under s 19(2)(g), no such planning permission is necessary for the making of such material change in the use of the land or building as the state authority may prescribe to be a material change.

[36] To answer the above question, it is necessary for us to examine contemporaneous documents. In this regard, the state secretary's letter is crucial. Where relevant, it reads as follows:

> 2. … mesyuarat EXCO Majlis Tindakan Ekonomi Selangor (MTES) pada 14 Januari 2003, telahpun meluluskan pemberimilikan tanah bekas Simpanan Talian Elektrik seluas 6.11 ekar di Taman Desaria bagi tujuan pembangunan penempatan setinggan Kampung Penaga yang akan dibangunkan oleh Syarikat Mentari Sdn Bhd.
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> 3. … mesyuarat juga telah membuat keputusan untuk mengkategorikan cadangan pembangunan tersebut menurut kategori yang diklasifikasikan di bawah Seksyen 19(2)(g) Akta Perancangan Bandar Dan Desa 1976, iaitu yang tidak memerlukan kebenaran merancang untuk menjalankan pembangunannya.

(Our translation:

> 2. the meeting of the state Economic Action Council EXCO on 14 January 2003 had approved the alienation of the ex-Electricity Reserve Land with an area of 6.11ac in Taman Desaria for the purpose of development, to re-settle the squatters in Kampung Penaga, which will be developed by Mentari Co. Sdn Bhd.
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> 3. the meeting has also made the decision to categorise the proposed

development in accordance with the categories classified under Section 19(2)(g) of the Town and Country Planning Act 1976 i.e which does not require planning permission to carry out the development.

[37] In relation to the exemption allegedly contained in the state secretary's letter, it is necessary for us to refer to MPPJ's reply to the Minister, alluded to in para [18] of our judgment herein. We note that it made no reference whatsoever to the alleged exemption, but merely informed the Minister that planning permission was approved.

[38] Had there been such an exemption, there would have been no necessity for MPPJ to subsequently initiate the process for the statutory hearing under s 21(6). The statutory hearing is clearly repugnant to or inconsistent with the existence of an exemption under s 19(2)(g).

[39] Quite apart from that, if there had been such an exemption, Mentari being the developer of the proposed development would certainly be among the first people to have known of its existence. However, there was no indication or suggestion whatsoever that Mentari was at the material time aware of the existence of such exemption.

[40] Another important contemporaneous document was the letter dated 30 March 2003 which the Selangor Deputy State Secretary (who was also the secretary of SEAC) wrote to the district officer and MPPJ. Enclosed therewith was an extract of the minutes of the SEAC Exco meeting held on 14 January 2003. The minutes categorically revealed that the decision on 14 January 2003 was purely to approve in principle the alienation of 6.11 acre of ex-electricity reserve land to Mentari. Again, the minutes made no mention whatsoever that SEAC has granted the exemption under s 19(2)(g).

[41] In any event, only the state authority is vested with the relevant power to grant the exemption under s 19(2)(g). Hence, the state authority (and not any other person) is the competent authority under s 19(2)(g).

[42] 'State Authority' is defined in the Interpretation Acts 1948 and 1967 to mean 'the Ruler or Yang di-Pertua Negeri of a State'. The Ruler acts on the advice of the state Executive Council (the state Exco). In law, SEAC is not the state Exco. SEAC is clearly not the authority vested with the power to grant the requisite exemption under s 19(2)(g). That being the case, the purported exemption which SEAC had allegedly granted does not come within the ambit of s 19(2)(g). Our answer to the above question is in the negative.

CONCLUSION

[43] On the foregoing grounds, we are of the view that the learned High

A Court judge had not erred in fact or in law in making the aforesaid orders. These appeals being without merits are dismissed with costs of RM25,000 against Mentari and MPPJ respectively. The decision of the High Court is hereby affirmed. Deposits to the applicants on account of the fixed costs. Also MPPJ's deposit in Appeal No B-02–435 of 2004 to be paid to the applicants as
B costs.

Appeals dismissed with costs of RM25,000.

C Reported by Kohila Nesan

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